



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 806

Case No. 900: EL-HAJ

Against: The Commissioner-General
of the United Nations
Relief and Works Agency
for Palestine Refugees in
the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry,
Vice-President; Mr. Francis Spain;

Whereas, on 20 June 1995, Abdul Hadi Ibrahim El-Haj, a former
area staff member of the United Nations Relief and Works Agency for
Palestine Refugees in the Near East (hereinafter referred to as
UNRWA or the Agency) filed an application that did not fulfil the
formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 11 September 1995, the Applicant, after making
the necessary corrections, again filed an application containing
pleas which read, in part, as follows:

"... I request UNAT [United Nations Administrative Tribunal]
to reinstate me to service with full payment of all my dues
and arrears related to my suspension period."

Whereas the Respondent filed his answer on 14 May 1996;

Whereas the Applicant filed written observations on 30 July
1996;

Whereas, on 26 October 1996, the Applicant filed an
additional document with the Tribunal;

Whereas, on 28 October 1996, the Tribunal requested the Respondent to provide it with the answers to certain questions, which answers were provided on 31 October 1996;

Whereas, on 2 November 1996, the Applicant filed additional documents with the Tribunal;

Whereas, on 6 November 1996, the Respondent filed with the Tribunal a response to the Applicant's memorandum of 2 November 1996;

Whereas, on 15 November and 3 and 16 December 1996, the Applicant submitted additional documents to the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 17 October 1960, as a Teacher at the grade 5, step I level, in Gaza, on a probationary appointment. From 8 to 10 September 1962, the Applicant was suspended without pay under Area staff rule 110.1 for failure to observe the standards of official conduct as required under the Area Staff Rules. He received a written censure from the Acting Field Personnel Officer, UNRWA, Gaza, on 10 September 1962. The Applicant's periodic report for the period 17 October 1960 to 21 September 1961 rated him as "a staff member who maintains a good standard of efficiency". His periodic report for the next period, ending on 9 September 1962, rated him as "an unsatisfactory staff member". The Applicant's annual increment was deferred by letter dated 28 February 1963, from the Field Personnel Officer, Gaza. He was suspended for ten days for negligence in the performance of his duties, after having received two warnings. His periodic report for the period ending 1 July 1963 rated his performance "unsatisfactory". The Applicant was demoted from grade 5 to grade 3 from 1 September 1963 until 1st March 1964.

The Applicant's performance evaluation reports (PERs) for the years 1964 through 1972 rated him as "a staff member who maintains a good standard of efficiency". Effective 31 January 1973, the

Finance, Personnel and Administration (DFPA), UNFPA, some information in order to "correct errors of omission" in her 1993 PAR.

The Applicant, by a memorandum dated 31 May 1994, to the Director, DFPA/UNFPA, requested a formal rebuttal investigation of her 1993 PAR. In its report dated 24 August 1994, the Rebuttal Panel concluded that "there [was] insufficient evidence to support the rating assigned and unanimously recommend[ed] that the MRG upgrade the rating provid[ed] by the supervisor".

By a letter dated 10 October 1994, the Director, DFPA/UNFPA informed the Applicant that the MRG had reconvened to consider the Rebuttal Panel's report and determined that the report "did not provide sufficient basis to justify a change in the rating". Therefore, the rating of (4) would be retained. The letter also advised the Applicant that, because her services "ha[d] not in all respects met the standards and requirements of UNFPA, management ha[d] decided not to offer [her] a renewal of [her] fixed-term appointment".

On 26 October 1994, the Applicant lodged with the Joint Appeals Board (JAB) a request for suspension of action under staff rule 111.2(c), seeking to suspend the decision to separate her from the service of the Organization on 14 November 1994. On 10 November 1994, the JAB unanimously adopted its report and recommended "that the suspension of action requested be granted and that no action be taken to carry out the separation process until a decision is taken on the substance of the [Applicant's] appeal".

On 11 November 1994, the Under-Secretary-General for Administration and Management notified the Applicant as follows:

"The Secretary-General has taken note of the Board's report and decided, taking into account the circumstances of your case, to approve the recommendation of the Panel with the understanding that your appointment will be extended through 14 February 1995 to enable the Joint Appeals Board Panel to submit its report on the substance of your appeal.

The Joint Appeals Board is being requested to submit its report on the substance of your appeal to the Secretary-General by 1 February 1995."

On 21 November 1994, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 27 January 1995. Its considerations and recommendation read as follows:

Considerations

"...

31. The Panel carefully considered the Appellant's PARs for the years 1991, 1992 and 1993. The Panel observed that these appraisals contained many positive statements regarding the Appellant's character, her language skills, her conscientiousness and hard work, and her ability to work with people. Similar statements were found in letters submitted by the Appellant from several consultants. The Panel also observed, however, statements in the Appellant's PARs by two supervisors and the MRG regarding inadequacies in her substantive and technical work:

(a) In the 1991 PAR, the Appellant's supervisor, who is no longer with the United Nations, discussed the 'dilemma' in the evaluation field in 'balanc[ing] substantive expertise and evaluation and monitoring skills' and stated that the Appellant was 'still undergoing a transitional phase where she may reach this balance eventually'. The comment by the Deputy Chief of the Evaluation Branch indicated that the Appellant 'would benefit from training in English writing and editing' and 'should acquaint herself with the relevant aspects of UNFPA policies and programmes'. The MRG referred to the Appellant's 'lack of familiarity with UNFPA policies and programme approaches', and advised that the Appellant should 'improve her output qualitatively' and that 'significant progress needed to be made to bring her performance to an acceptable level'.

(b) In the 1992 PAR, although the Appellant received a rating of (3) from her supervisor and the MRG and improvements were noted in her performance, the Panel [noted] several comments by her supervisor suggesting that there was 'still room for improvement' in her written work, e.g., '[h]er written output has improved in quality, although there is still room for improvement'; '[t]he ultimate products

still vary significantly in quality from case study to case study but the discrepancies would have been even more drastic without her intervention'.

(c) In the Appellant's 1993 PAR, 'inconsistency' in the quality of her written outputs was cited as a primary reason for finding that her performance did not meet expectations in full, i.e., a rating of (4). The MRG 'noted that the quality of [the Appellant's] work was inconsistent and her performance uneven'.

32. During the hearing, the Panel had the opportunity to hear the Appellant's supervisor describe the Appellant's work during 1992 and 1993, and elaborate on the quality of the Appellant's performance. The Appellant's supervisor further explained her reasons for having given the Appellant's performance a rating of (4) in 1993.

33. The Panel carefully reviewed the Rebuttal Panel's report of 24 August 1994 and heard from two of the members of the Rebuttal Panel. Although the Rebuttal Panel had recommended that the MRG upgrade the Appellant's rating, such recommendation was based on the insufficiency of the evidence to support the lower rating, i.e., the lack or inadequacy of documentation on (i) the results of the Appellant's 1993 mid-term review, (ii) an elaborated performance plan or training programme or (iii) variations in the quality of the Appellant's work. It was thus the absence of documentation to demonstrate the inadequacy, rather than evidence of the quality and adequacy, of the Appellant's performance that was the basis for the Rebuttal Panel's recommendation.

34. The Panel considered the efforts over the past four years by the Appellant and the Organization to support the Appellant's professional development. In this regard, the Panel noted that the Appellant had taken, as had been recommended, various seminars and workshops, and was pursuing a doctorate degree in a field relevant to her work. In addition, the Appellant's supervisor explained her efforts to work with the Appellant to improve the Appellant's written work product. Despite such efforts, based on the supervisor's testimony and the Appellant's PARs, the Appellant's performance was not found to meet the performance expectations in full.

35. Based on the foregoing, the Panel concluded that, as early as 1991, it appeared that the Appellant may not have possessed all of the skills required for the P-3 Evaluation Officer post. Since then, there had been genuine efforts on

the part of the Appellant and the Organization to assist her to acquire the skills necessary to perform the functions of the post. Nevertheless, her supervisor and the MRG found that the Appellant's 1993 performance did not satisfy some of the performance expectations. In reaching its conclusion, the PAR guidelines (paragraph 58) require the MRG to consider the Rebuttal Panel's report and recommendation, which was done by the MRG in this case, but do not require the MRG to accept the recommendation of the Rebuttal Panel. In sum, the Panel found no evidence that (i) the supervisor's rating of the Appellant's performance or (ii) the MRG's decision to maintain such rating was arbitrary or based on discrimination, prejudice or other improper motive.

36. According to the PAR guidelines (paragraph 33), if a staff member's performance receives [two successive (4) ratings], UNFPA has several options, including separation of such staff member from UNFPA service. Moreover, after four years of fixed-term employment, UNFPA usually considers a staff member for a probationary appointment which 'is normally of six months' duration' and, '[i]f the recommendations ... are positive, the probationary appointment is converted to a permanent appointment ...' After four years of fixed-term appointments, the MRG met and determined not to renew the Appellant's fixed-term appointment. The Panel found no evidence that this decision was arbitrary or based on discrimination, prejudice or other improper motive.

37. As had been pointed out by the Rebuttal Panel, when a staff member's performance is rated as (4), the PAR guidelines (paragraph 32) require the supervisor 'to keep track of specific critical incidents of poor performance and behaviour as well as clear instances of improvement, to help the staff member understand in precise terms those areas where performance requires improvement.' Further suggestions are made regarding more frequent interim reviews and a more elaborate Performance Plan. The Panel found that documentation of critical incidents of poor performance, and of the efforts to address such incidents, was lacking and would have been useful to substantiate the decisions taken by the Appellant's supervisor and ultimately by the MRG. In particular, the Panel noted the absence of documentation regarding the Appellant's 1993 mid-term appraisal. In addition, the Panel was disturbed that UNFPA (and thus the Appellant) did not have a current post description outlining the duties and responsibilities of a P-3 Evaluation Officer.

Recommendation

38. Based on the foregoing considerations, the Panel makes no recommendation in support of the appeal."

On 3 February 1995, the Secretary-General transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has re-examined your case in the light of the Board's report and noted its finding that the decision not to renew your appointment was not arbitrary or based on discrimination, prejudice or other improper motive; and, that it made no recommendation in support of your appeal. Accordingly, the Secretary-General has decided to maintain the contested decision and to take no further action on your case."

On 15 June 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant had a legitimate expectancy of further employment after the expiration of her fixed-term contract.
2. The Respondent's decision not to extend the Applicant's contract was tainted by prejudice, caprice and lack of due process.

Whereas the Respondent's principal contentions are:

1. The Applicant has failed to establish any basis for her claim that she had an expectancy of renewal of her fixed-term appointment.
2. The UNFPA MRG properly evaluated the Applicant's performance.
3. The Applicant has not adduced evidence of prejudice or lack of due process in the decision not to extend her appointment.

The Tribunal, having deliberated from 4 November to 21 November 1996, now pronounces the following judgement:

I. The Applicant worked as an Evaluation Officer at the P-3 level at the United Nations Population Fund (UNPFA) since 1990 under a series of fixed-term appointments. On 14 February 1995, the Applicant was separated from service. During her period of service with UNPFA, the Applicant received three periodic performance appraisal reports (PARs) which assessed the Applicant's performance for the years 1991, 1992 and 1993. The Applicant's PAR for 1991 indicated a rating of (3) - "meets the expectations of the performance plan" which was, however, downgraded by the Management Review Group (MRG) to a rating of (4) - "meets some of the expectations of the performance plan but performance needs improvement". For the year 1992, she received a rating of (3). For 1993, she received a rating of (4).

II. Following the 1993 rating, the Applicant requested a formal rebuttal investigation. This resulted in the Rebuttal Panel recommending that the MRG upgrade the PAR. However, on 10 October 1994, the MRG informed the Applicant that they rejected the Panel's recommendation and maintained the rating of (4). They also advised the Applicant that her service "ha[d] not in all respects met the standards and requirements of UNPFA" and therefore her fixed-term appointment was not renewed. Thereafter, the Applicant appealed to the Joint Appeals Board (JAB) who did not support the Applicant's appeal and whose recommendations were accepted by the Secretary-General.

III. The main issue in the case is whether the non-renewal of the Applicant's fixed-term contract with UNPFA violated her rights. The Applicant argues that the decision by UNPFA not to renew her

contract was arbitrary and tainted with prejudice. She asks the Tribunal to reinstate her retroactively from 14 February 1994 and to compensate her for material and moral injuries.

IV. At the outset the Tribunal will deal with the Applicant's request for the production of documents. It appears to the Tribunal that the documents and information sought are not relevant. Therefore, this request is rejected.

V. The Applicant contends that she had an expectancy of renewal of her contract. She cites in support of her case, Judgement No. 345, Najjar (1985), which holds that in determining fixed-term appointments three considerations are taken into account: the record of performance, the need for continued service and the availability of suitable posts. The Tribunal is of the view that this case does not support the Applicant's argument. It is clear from the facts that the Applicant did not satisfy at least one of these considerations, as her record of performance was considered weak. In addition, the Applicant cites Judgement No. 142, Bhattacharyya (1971). From that case, it is clear that consideration of the renewal of a staff member's contract must involve factors other than the mere expiration of the fixed-term contract. Here too, the Tribunal concludes that this judgement does not support the Applicant's case. The basis of the non-renewal of the Applicant's contract was not the expiration of her fixed-term contract but the inefficiency in her work performance. Therefore, the Director had linked the Applicant's termination to a specific cause.

VI. The Tribunal finds it surprising that the Applicant would have expected a renewal of her contract. She was fully aware that her performance had been rated at (4) for the second time. Moreover, as early as 1991, the MRG advised the Applicant that she should "improve her output qualitatively" and that "significant

progress needed to be made to bring her performance to an acceptable level". Once again, in 1992, the Applicant was informed that "there is still room for improvement".

Paragraph 32 of the PAR guidelines specifies that if the staff member's performance "continues to be lacking and the staff member is rated a second time in this category [(4)] ... these steps may be taken ... (b) separation from ... service".

Accordingly, the Tribunal rejects the contention that the Applicant had an expectancy of renewal.

VII. The Applicant asserts that the MRG's rejection of the Rebuttal Panel's recommendation was unfounded and that the MRG provided only a "flimsy" explanation for its rejection. The guidelines for the PAR provides inter alia:

"37. The main purposes of the MRG are to:

a. Review and approve narrative appraisals and performance ratings by supervisors to ensure consistency and fairness ...

b. Propose staff for promotion through the existing Appointment and Promotion machinery.

...

44. ... [T]he quality of the [MRG] narrative in section 10 is important because the staff member learns how managers view him or her in addition to the immediate supervisor. The narrative feedback must reflect accurately and comprehensively the MRG's deliberations. This is important for staff at any level of performance including those at the (3) rating level ..."

The Tribunal considers that the MRG followed the above guidelines and endorsed the rating of (4) that was given to the Applicant by her supervisors, stating that the Applicant's work was inconsistent and her performance uneven. The Tribunal considers this explanation was justifiable and not at all flimsy. In addition, the MRG carefully reviewed the recommendation of the

said, inter alia, "I now consider that letter from the past and let bygones be bygones. I therefore intend to open a new chapter promising to cooperate fully with all my superiors especially my direct superior, [the A/CERO]." This can only mean, in the view of the Tribunal, that he not only retracted many, if not all, of his accusations against the Respondent, but also agreed to cooperate with his supervisor, the A/CERO.

VI. The Tribunal also notes that the Applicant was given a further chance to improve his prospects. An examination was held to fill the vacancy resulting eventually from the retirement of the regular CERO of Deir-el-Balah Distribution Office. The Applicant claims that he came first in this test, but the record shows that this was not so.

From 17 April 1994, when the Applicant was told why he had not been selected for the vacant job of CERO of Deir-el-Balah Distribution Office, his conduct and performance improved. This opinion was given by the A/CERO who had previously complained about his lack of cooperation and his insubordination. However, the evidence shows that the favourable message written by the A/CERO on 2 May 1996 was "because he was blamed by people who told him not to be the one who could cause [the Applicant's] separation from the Agency." That some such pressure or duress was at the back of the A/CERO's apparent change in attitude was further confirmed by the A/CERO's comments in subsequent documents. The instances of breaches of discipline and insubordination for which the Applicant's services were terminated all occurred well before the examinations of April 1994.

VII. The Joint Appeals Board (JAB) enquired into the Applicant's complaints and unanimously recommended "to uphold the Administration's decision to terminate the Appellant's service in

the interest of the Agency under Area staff rule 109.1; and that the case be dismissed."

The Tribunal accepts the finding of the JAB and has not found that the Applicant produced any reliable evidence to establish prejudice or bias on the part of the Respondent in the action taken against the Applicant.

VIII. In view of the above, the Tribunal rejects the application in its entirety.

(Signatures)

Samar SEN
President

Hubert THIERRY
Vice-President

Francis SPAIN
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary